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NEPA Draft Report Comments
c/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building
Washington, D.C. 20515

Re: Comments on NEPA Draft Report

Dear Sir/Madame:

This comment letter is submitted on behalf of the Committee on Environmental Law of The Association of the Bar of the City of New York (hereinafter "Committee") regarding the Initial Findings and Draft Recommendations of the Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act, issued on December 21, 2005. Members of the Committee are drawn from the private, government and non-profit sectors and represent diverse viewpoints with respect to national and local environmental matters. Many members have significant experience with conducting or commenting on environmental reviews prepared under the National Environmental Policy Act (NEPA). In general, the Committee supports the effort by the Task Force to enhance the coordination of federal agencies with state, tribal and local agencies and the need to clarify specific NEPA procedural timeframes. However, the Committee finds that several of the draft recommendations should not be finalized because the changes proposed in them are not necessary or prudent.

Group 1 - Addressing Delays in the Process

Recommendation 1.1, Definition of a Major Federal Action: The Committee has concerns with the Task Force's suggestion to create a new definition of a "Major Federal Action" that would only include new and continuing projects that would require substantial planning, time, resources

or expenditures. The current definition under existing regulations (*see* 40 C.F.R. §1508.18) of a 'Major Federal Action' is any action that may be major and which is potentially subject to Federal control and responsibility. 'Major' reinforces but does not have a meaning independent of "significantly affecting the quality of the human environment." "Actions" include the circumstance where the responsible officials fail to act; new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals.

In determining significance, existing regulations correctly focus agency attention on a federal action's potential to have a significant impact on the environment. The proposed definition diverts that focus to other characteristics of the federal action, like cost and time, that may have no relationship to the action's environmental impacts. The clearest example of such a case is the common scenario where a federal agency fails to act or regulate. Existing regulations correctly recognize that an agency's inaction or failure to act can be a major federal action with significant environmental consequences. The proposed definition would likely exclude agency inaction from ever meeting the "Major Federal Action" criteria, and, consequently, NEPA's requirement to prepare an EIS.

Further, the current, substantial case law supports a valid and appropriate understanding of the concept of a Major Federal Action.

Finally, the process of alignment among federal agencies over the interpretation of the definition would have to be essentially repeated, and established agreements among federal agencies would have to be reevaluated. This would create regulatory uncertainty, especially where cooperating agencies are involved.

Accordingly, the Committee recommends that the Task Force not propose changes to the definition of a "Major Federal Action."

Recommendation 1.2, Mandatory Timelines: The Committee supports the addition of timeframes of 9 months to complete an environmental assessment (EA) and 18 months to complete an environmental impact statement (EIS). However, failure to meet these deadlines should not automatically result in an EA or EIS being considered complete as suggested by the Task Force. Instead, an agency's failure to meet these timeframes should be subject to the same judicial review requirements as any other failure by an agency to meet regulatory timeframes (i.e., delay in issuing a permit, delay in promulgating regulations) -- the developer can always seek judicial review of the agency's failure to meet the regulatory timeframes in court. Further, the Task Force should also find ways to require that Federal agencies begin the scoping process as early in the process as possible and not allow agencies to delay such scoping by refusing to begin the process until an application for a permit or license is complete. The Task Force's proposal that EISs be completed within 18 months should not be hindered by an agency refusing to begin the NEPA review process until after considerable "internal" data is collected, which is another way that Federal agencies have delayed the issuance of permits or licenses in the past.

Recommendation 1.3, Unambiguous criteria for CE, EA and EIS: The Committee agrees that many Federal agencies' NEPA regulations need to be clarified as to the appropriate procedures to follow for EAs and EISs, but the Committee does not believe an amendment to the statute is required to achieve such clarity. Some agencies have clear requirements for EAs but not for EISs. Some agencies' regulations are vague with regard to procedures for supplementing EAs or EISs. However, the Committee reserves its opinion on this matter until specific details have been proposed.

The Committee also believes that Federal agencies should consider revising their Categorical Exclusions to provide some flexibility on "like kind replacements." With the national disasters now facing this country, as seen in Lower Manhattan after September 11 and what we expect has occurred in the Gulf Coast, often utility lines, pedestrian walkways, temporary roads and other necessary public services cannot be replaced in-kind in the exact same location because it is either not feasible or not prudent. For instance, destruction from such disasters may prohibit the location of a public use at the exact original location. States, as part of their mini-NEPA programs, provide more discretion by treating "minor relocations" of such public uses as a Categorical Exclusion. Thus, the Committee suggests that the Task Force recommend that the Federal agencies reconsider their "like-kind" or "in-kind" replacement Categorical Exclusions with one that provides some limited flexibility.

Recommendation 1.4, Supplemental NEPA documents. It is not clear what the Task Force is recommending here.

Group 2 -- Enhancing Public Participation

Recommendation 2.1, Giving Weight to Localized Comments: The Committee opposes the application of any weighing factor on public comments that is based on the origin of the comments or the proximity of the commenter to the affected area. Such a requirement amounts to a de facto residency requirement and improperly focuses the agency's valuation of comments to a criterion that may have no relationship to the quality and substance of the comment, which is what truly matters.

Improvements in the science and technology of environmental monitoring have shown how seemingly local activities can have far-reaching negative environmental impacts that cross county and state boundaries and affect individuals residing in localities hundreds of miles away. At the same time, the affordability of long-distance travel continues to allow millions of Americans to routinely travel hundreds to thousands of miles each year to recreate in the Nation's numerous state and national parks, its ocean beaches, and vast wilderness. As a result, an individual's proximity to the area affected by a federal proposal has become increasing unreliable as a general test criterion in determining one's stake in the matter.

Finally, it is administratively infeasible to ask agencies that receive hundreds of comment letters to determine the location of each commenter; moreover, agencies should give equal weight to all comments as is the norm today. Generally, it is expected that most comments will be sent by local community members, and agencies already have discretion to meet and focus on local

community concerns as compared to interest groups that reside far from a project. Moreover, agencies already have discretion on what weight to give to "form letters" as compared to detailed comment letters by individuals or groups. Requiring agencies to give more consideration to localized comments - aside from the methodological challenge- runs contrary to one of the key precepts of NEPA, which is that the environment is shared by everybody. The Committee believes that agencies should continue to consider all comments equally, based on the quality and substance, and irrespective of the source or origin of the comments. Thus there is no reason to add this language to the NEPA regulations.

Recommendation 2.2, Limit EISs to 150 to 300 pages. While the Committee agrees that EISs have become too lengthy and complex over time, the Committee believes the proposed page limitations are too narrow for large complex projects that might extend over a large land or water area and where multiple uses are proposed. The Committee suggests that a page maximum might be better expressed as 600 pages with the ability for an agency to exceed that for complex projects by a demonstration of need. Increasingly, agencies have tried to reduce the size of the core EIS document by putting detailed technical or back-up information in appendices. This enables agencies to highlight the key impacts while providing a transparent means by which the public can review the underlying data and considerations. The Committee endorses the practice of utilizing appendices as long as the appendices are available in the public repositories and by either compact diskette or on a public website.

Group 3 -- Better Involvement for State, Local and Tribal Stakeholders

The Committee generally supports both recommendations. However, with regard to recommendation 3.1, the Committee suggests that cooperating agency status only be granted to state, local and tribal jurisdictions that have a discretionary decision-making role regarding a particular federal action and not to agencies that seek to serve as a cooperating agency when they have no decision-making role (i.e., will not be approving or funding an action). The Committee also believes that recommendation 3.2 is very important to reduce unnecessary duplication of efforts. Agencies within states like New York, which have mini-NEPA programs, have considerable experience and expertise in conducting environmental reviews; thus Federal agencies should be encouraged to incorporate by reference the state environmental review documents, after proper review by the Federal lead agency.

Group 4 -- Addressing Litigation Issues

Recommendation 4.1, Citizen Suit Provisions: The Committee supports citizen standing in general and citizen suit authorization within particular statutes where no authority exists under separate statutes or where such authorization is unclear. Since NEPA is a procedural statute applicable to government decision-making, the Committee perceives no need for broader authorization to sue regulated firms or permittees, as is provided in other statutes. The well-established right of review under the Administrative Procedure Act appears to be the appropriate mechanism for review of agency decisions under NEPA.

Many of the issues that trouble the Task Force seem to stem from a perceived imbalance towards the participation of challengers in NEPA lawsuits. If systematic studies of data do indeed show that industry groups or applicants are unable to protect their interests in litigation and settlements through intervention or otherwise, then a more targeted adjustment of intervention rules might be appropriate. As to the new review standard of "best available information and science," the Committee believes that this concept is already subsumed in the "arbitrary and capricious" standard applied by courts. On close matters of science and data, courts generally defer to agency judgments absent egregious and obvious errors, and this would also be the likely result of the new standard. In short, the considerable jurisprudence concerning the "arbitrary and capricious" standard counsels against the introduction of a new standard, the terms of which will be litigated in court and create many years of uncertainty.

Similarly, the Committee does not agree that the Task Force, or the CEQ in modifying the NEPA regulations, should provide guidelines for who has standing to challenge an action. Standing has been defined by the federal courts and should be left to judicial precedent.

The Committee does agree, however, that a NEPA statute of limitations should be created and the 180-day period suggested by the Task Force is reasonable, particularly if paired with the recommendation for greater availability of the administrative record. The current default rule is to apply the general six-year statute of limitations for claims against the government, which is unnecessarily long, does not provide sufficient time for agencies to adjust their decision making upon reversal, may bias courts towards denying injunctive relief if there have been significant intervening events, and ultimately may add to the perception that NEPA is used as a strategic tool for delay. The six-year statute of limitations is also not useful to citizen plaintiffs who wish to challenge a project because courts ultimately might deny a lawsuit on the grounds of laches, particularly if construction of a project has moved forward. The suggested 180-day statute of limitations will provide more certainty to government agencies, developers and future petitioners.

Recommendation 4.2, Pre-Clearing of Projects. The Committee supports this proactive requirement, which will ensure uniformity in procedural requirements across agencies and geographic areas. Ultimately, coordination between agencies on procedural matters will work its way into judicial decisions, which should also result in more uniformity on procedural matters.

Group 5 -- Clarifying Alternatives Analysis

The Committee generally supports the recommendations. The Committee also suggests that for recommendation 1.1 in defining "reasonable alternatives" that would permit lead agencies to take into account cost, existing technologies and socioeconomic consequences in determining what alternatives to consider, another item for consideration should be the "use and purpose of the action."

The Committee disagrees with the recommended inclusion, as suggested in Recommendation 5.3, of a caveat that "if mitigation is made an integral part of the proposed action," a binding requirement to mitigate is not necessary. Typically, a project might have specific design

attributes that are part of the proposed action, and thus are not called out as "mitigation" in the EIS (i.e., state-of-the art pollution controls might be part of the design of a project, and just are not called out as mitigation in an EIS, but the controls will be required in a permit). Mitigation is typically understood to comprise the add-on components to a project that are needed because even with state-of-the-art technology, significant adverse impacts will still occur absent such mitigation. Thus, this caveat is unnecessary, as integrated project elements are not considered to constitute "mitigation," and applicants will -- and should -- be bound to include them as conditions of project approval.

Group 6 -- Better Federal Agency Coordination

Conceptually, the Committee supports the recommendations but reserves its right to comment on any changes to the statute or regulations proposed to implement these recommendations.

Group 7 -- Additional Authorities for the CEQ

Conceptually, the Committee supports the recommendations but reserves its right to comment on any changes to the statute or regulations proposed to implement these recommendations.

Group 8 -- Cumulative Impacts

Recommendation 8.1, Past Actions for Assessing Cumulative Impacts. It is not clear what is meant in this recommendation by the statement "an agency's assessment of existing environmental conditions will serve as the methodology to account for past actions." For example, is the recommendation intended to mean that no analysis of the impacts of past actions would be required, as it would be considered to be subsumed within the analysis of existing conditions? The Committee reserves its right to comment on this once the Task Force clarifies the intent and scope of this recommendation.

Recommendation 8.2, Future Actions for Assuming Cumulative Impacts. The Committee disagrees that 40 C.F.R. § 1508.7 needs to be revised to limit the scope of cumulative analyses to include only concrete proposed actions. The definition of "concrete proposed action" is not necessarily more explicit than the current "reasonably foreseeable" term. If the proposed term is meant to refer to a much narrower universe of projects than those that are reasonably foreseeable, the proposed change could invite strategic behavior such as arranging projects in time so that adjacent or overlapping projects are not actually "concrete" at the same time. That distortion in decision making behavior would not serve the interests of NEPA, the public or, ultimately, private entities. The Committee believes that the scoping process can play a useful role and is a much more project-specific and therefore effective tool than tinkering with regulatory language. If an agency identifies during the scoping process what other projects it intends to include in the "Future No Action" condition, an agreement can be reached early in the analysis and environmental review process. After the DEIS has been issued, projects can be added or eliminated, based on the comments received. If someone were to argue that a project should have

been included in the No-Build condition to assess potential cumulative impacts, and did not raise this during the environmental review process, then this would weaken their argument. In addition, only projects that could reasonably be expected to exert their impacts in the same geographic area and time frame as those generated by the Proposed Action should be included for cumulative impact analysis. The impacts of such projects do not have to be significant to be considered, as the significance could result from the cumulative nature of the impacts.

Thank you in advance for your consideration of these comments. We look forward to reviewing the Task Force's final recommendations and any proposed rulemakings under NEPA.

Respectfully,

The Association of the Bar of the City of New York, Environmental Law Committee

Christine Fazio, Esq.
Chair